



NATIONAL ASSOCIATION OF THE DEAF

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November 26, 1997

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Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: In the Matter of Closed Captioning and Video
Description of Video Programming, Implementation of
Section 305 of the Telecommunications Act of 1996, Video
Programming Accessibility, MM Dkt. No. 95-176

Dear Mr. Caton:

Enclosed please find an original and fourteen copies of a Response to the Requests for Reconsideration filed in the above docket. This Response is submitted on behalf of the National Association of the Deaf and the Consumer Action Network. It has been served on all interested parties.

I would appreciate your referring all correspondence regarding this matter to my attention.

Sincerely,

Karen Peltz Strauss
Legal Counsel for Telecommunications Policy

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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**RESPONSE OF THE NATIONAL ASSOCIATION OF THE DEAF AND
THE CONSUMER ACTION NETWORK
TO REQUESTS FOR RECONSIDERATION**

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November 26, 1997

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**RESPONSE OF THE NATIONAL ASSOCIATION OF THE DEAF AND
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I. Introduction

The National Association of the Deaf (NAD) and the Consumer Action Network (CAN), collectively referred to as the "NAD et. al.," hereby oppose the Requests for Reconsideration submitted by the Association of America's Public Television Stations (APTS); the Association of Local Television Stations, Inc. (ALTV); Encore Media Group L.L.C.; NIMA International; the Outdoor Life Network, L.L.C., Speedvision Network, L.L.C. and the Golf Channel (Outdoor Life, et. al.); and the Game Show Network, L.P., as well as the Request for an Immediate Stay submitted by NIMA International. At the same time, the NAD et. al. wishes to express its support for the Request for Reconsideration submitted by Self Help for Hard of Hearing People, Inc. The issues raised by each of these petitions are discussed below.

II. The FCC Should not Exempt All Instructional Programming

APTS seeks an exemption for instructional programming offered by public television stations to elementary, secondary, and post-secondary schools. While APTS is not concerned about programming offered by PBS, which, it acknowledges is largely captioned, it expresses concerns about the costs associated with captioning other programming which it says is produced by "public television station university or college licensees or by consortia of public television educational licensees for use on a local or regional basis." According to APTS, the Commission should exempt all instructional programming because it is intended for reception by specific audiences, i.e., school children, college/university students, and adult learners enrolled in telecourses, rather than the general public. Among other things, APTS argues, there is no need to require captioning in this proceeding, as other laws require such instructional programming to be accessible.

APTS' reasoning contains several flaws. First, the very existence of other federal laws requiring access to the classroom provides the most compelling reason for the FCC *not* to grant a wholesale exemption for instructional programming. These laws, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and the Rehabilitation Act, demonstrate that our nation has adopted a clear and unequivocal mandate to ensure educational access for all children and adults with disabilities. The federal agencies responsible for implementing these various laws are engaging in active efforts to achieve the full integration and acceptance of

disabled children into all aspects of our society.¹ FCC action to the contrary would fly in the face of this clearly defined national policy.²

A captioning mandate for instructional programming is critical for another reason. More than two thirds of all deaf and hard of hearing children receive their education in mainstreamed public school settings.³ Many of these students remain in considerable isolation while in these classrooms. A contributing factor to this isolation is the fact that much instructional video programming does not yet contain captions. This is because although the federal laws mentioned above require access for children with disabilities, they do not specify that access for video programming must take the form of captioning. As a consequence, many school districts choose interpreters, written notes, or transcripts as the means of accommodating video programming for deaf and hard of hearing children. These auxiliary aids simply do not provide the same level of access as does captioning, which provides information that is simultaneously provided and fully integrated with the visual picture. Thus, an FCC requirement for captioning of televised instructional programming is both a necessary and significant supplement to the above laws.

¹ For example, as recently as October of 1997, Judith E. Heumann, Assistant Secretary for Special Education of the U.S. Department of Education, informed Mr. William H. Gates, CEO of Microsoft Corporation, of a letter which the U.S. Department of Education would soon be sending to every school district throughout the country that "emphasizes the responsibility of school systems under several Federal statutes to provide technology access, and . . . the desirability of considering access issues as an early and integral part of technology procurement." The letter explained the importance of providing the tools needed to ensure that disabled individuals "learn and work in equal measure alongside their non-disabled peers, fully contributing to all aspects of societal life."

² The Commission's broader exemption based on revenues and its two percent spending cap are more than sufficient to protect public television station licensees from any economic burdens they might otherwise suffer.

³ See Attachment A, Gallaudet Research Institute, *Annual Survey of Deaf and Hard of Hearing Children and Youth*, (Wash. D.C. 1995-96).

The FCC should mandate captioning on instructional programming for yet a third reason, one which pertains to the Commission's very own obligations under other provisions of the Telecommunications Act of 1996. Specifically, Section 254 of the 1996 Act establishes guidelines for the provision of universal service funds to our nation's schools. The FCC has recognized that the goal of this section is to provide our nation's school children with the "skills needed for jobs in a technologically advanced society." *In the Matter of Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order Establishing Joint Board*, FCC 96-93, CC Dkt. No. 96-45 (released Mar. 8, 1996) at ¶72. The failure to caption instructional programming will hinder the achievement of this laudable goal, as it will deny school children and college aged individuals the same learning opportunities as their nondisabled peers.

The NAD and CAN are similarly distressed that Encore Media Group, which has created WAM!, a children's commercial free educational and entertainment network, seeks to exclude deaf and hard of hearing children from enjoying the benefits of its programming. Encore's petition is curious, at best, as it repeatedly notes the importance of providing children with commercially limited educational programming, yet discounts the harm that will result by intentionally precluding access to such programming by deaf and hard of hearing children.⁴ Moreover, Encore's suggestion that WAM! would be overburdened by having to caption all of its

⁴ Encore's submission similarly ignores the significant benefits of captioning for improving reading comprehension and spelling, augmenting vocabulary and word recognition, and increasing the overall motivation to read. Numerous studies have confirmed these varied benefits. See Comments of the NAD, *In the Matter of Closed Captioning and Video Programming*, CC Dkt. No. 95-176 at 10 (March 15, 1996), citing to Jensema, "The Benefits of Closed Caption Television as Reading Material for Children," Institute for Disabilities Research and Training, Inc., MD; Koskinen et. al., "Using Captioned Television to Enhance the Vocabulary and Reading Comprehension of Adult Beginning Readers," American Educational Research Association, LA (1994).

shows which are produced in Canada or Australia, because "captioning is virtually non-existent" in those countries, cannot be further from the truth. Encore Request at 4. In the spring of 1995, the Canadian Radio and Telecommunications Commission (CRTC) created a comprehensive captioning mandate, requiring licensees of all stations earning more than ten million dollars in annual advertising revenues and network payments to caption at least ninety percent of all programming during the broadcast day by the end of their license terms.⁵ CRTC Public Notice 1995-48. The existence of such a mandate has resulted in the extensive provision of captioning on Canadian television, including 100% captioning on CTV, one of Canada's broadcast networks. While self regulated, the Australian Caption Centre also reports that captioning on its programs is increasing, with much of its prime time programming already captioned. If anything, the acquisition of programs from Canada and Australia should assist, rather than hinder, Encore's efforts to caption its programs on WAM!

Access to instructional, educational, and entertainment programming is critical to enabling our nation's children to achieve acceptance among their peers and to garner the skills necessary to become productive citizens in our society. We urge the FCC to follow the path paved by Congress and other federal agencies toward achieving such access, and to reject petitioners' suggestion that we take a huge step backwards for our nation's children with hearing disabilities by exempting such programming from the captioning mandates.

⁵ It is worth noting that the new law also requires 100% captioning of local news programming, with "either real-time captioning or another technology capable of producing high quality captioning for live programming." Electronic newsroom captioning is not considered an acceptable method of captioning live news by the CRTC.

III. The Commission Should Eliminate its New Network Exemption

SHHH urges the FCC to modify its final rule for new networks in a manner that takes into consideration each network's ability to pay for closed captioning (SHHH Request at 8). We agree that a modification of the rules in this fashion would be consistent with Congress' intent to relieve providers of their captioning obligations *only* where there is evidence of economic burden. For this reason, we also oppose the suggestion of the Outdoor Life Network, et. al. and the Game Show Network (GSN) to receive an additional eight to ten years for compliance with the FCC's transition schedule after their initial four year exemption has terminated. Similarly, we oppose the suggestion of GSN to exempt all start up networks until they reach 20 million viewers and to toll the four year exemption until the FCC's closed captioning regulations become effective in January of 1998. GSN Request at 2-3.

In our Reply Comments on the captioning docket, we opposed any new network exemption, and pointed out the hazards of creating barriers to access during the inception of any product or service presented for public consumption. We noted there that, with respect to many products and services, the failure to consider and address access needs during these early stages typically results in the ongoing denial of access to individuals with disabilities even after such products and services come to gain full acceptance in our society. We concluded that the FCC's then proposed exemption for new networks promised to repeat this pattern. Rather than incorporate the costs of providing access as an ordinary business expense right from the start, we argued that the networks would be given a free ride for four years, regardless of their ability to pay for such access.

By directing new networks to meet the required levels of captioning at the end of these four years, we understand that the FCC sought to achieve a balance between the positions presented by consumers and programming providers. Unfortunately, as we predicted in our reply comments, apparently even this is not enough for these networks. Specifically, our reply comments pointed out that if the FCC exempts networks for a period of years, “[t]he result is all too predictable: at the end of the five years, these networks will argue that captioning costs have not been built into their operating expenses and will seek further exemptions from the rules.” Reply Comments of NAD at 18. Our prediction has come true ahead of its time. Although the networks will have as many as four years from the effective date of the FCC’s rules to develop operating budgets that incorporate captioning costs, they have already come forward to proclaim that they will not be able to meet those costs at the conclusion of this time.⁶

We urge the FCC to grant SHHH’s request to rescind its rule with respect to new networks, to the extent that such rule grants a categorical exemption which is not based on a network’s ability to afford captioning expenses. In the alternative, we urge the Commission not to grant the requests of the new networks to broaden even further the new network exemption. The rules already provide more than enough leeway for those new networks that remain financially challenged at the end of the four years. Such networks will remain eligible for an

⁶ We disagree with Outdoor Life that networks will be required to achieve the captioning of hundreds of hours of programming per quarter “instantaneously, like throwing a switch.” Outdoor Life, *et. al.* Request at 7. As Outdoor Life, *et. al.*, acknowledges, advanced knowledge about the captioning mandates should permit “long-term budgeting of captioning costs.” *Id.* at 8 n. 9. It should be remembered, as well, that networks which have already been in existence when the FCC’s rules go into effect will have only minimal captioning obligations at the time that these mandates begin to apply to them (i.e., only the first benchmark will have to be met.). To the extent that even these obligations are too burdensome, such networks will still have the right to seek undue burden exemptions from the FCC, as noted above.

exemption from the captioning mandates if (1) they fall into the general revenue exemptions contained in the new rules (three million dollar revenue minimum/two percent cap), or (2) the provision of captions on their networks would otherwise result in an undue burden. Anything broader than this would surely violate Congressional intent to limit exemptions from the captioning mandates.

IV. The FCC Should *not* Exempt Home Shopping and Infomercials

The NAD and CAN oppose an exemption for home shopping and infomercials. (NIMA Request; ALTV Request at 9). In its Request for Reconsideration, NIMA alleges that its programming “already provides viewers with the material information they need to understand the programming through graphics and superimposed text,” and that the conversation which occurs in its advertisements is “of marginal relevance to the viewer.” NIMA Request at 3, 4. In fact, however, all one has to do is to watch a long-form advertisement for a few minutes to ascertain that the visual portion of the program alone cannot provide viewers with enough information to make informed judgments about the advertised products and services.

An example will best illustrate this point. Other than listing the item number, call-in number and price, the only graphics available in a recent advertisement for a household cleanser on America’s Store were the name of the cleanser and its basic function (“solid and liquid cleanser”). In contrast, viewers able to hear the audio content of the advertisement were given information about the types of surfaces and stains suitable for the cleanser’s use, how to dilute the cleanser, the number of applications contained in the cleanser’s bottle, the discount available, money back guarantees, materials needed to apply the cleanser, and facts about the cleanser’s composition, as well as its safety around children and pets. NIMA would be hard pressed to

suggest that such extensive information about this or any product would be unrelated to a consumer's decision to buy the product. Indeed one must question why the network goes to the trouble and expense to provide such dialogue if it is *not* designed to induce consumer purchases.

NIMA also argues that captioning may block the presentation of on-screen textual information. NIMA complains that the FCC's ruling which requires viewers to choose between the textual material and captions is unreasonable. NIMA's argument is unpersuasive for two reasons. First, program graphics can be redesigned so as to minimize their interference with captions. Second, trained captioners have already and can continue to successfully place captions in a manner on the screen (e.g., bottom, top, left, right, or on two lines only) that does not obstruct the textual or graphic information of a given program. Additionally, with the advent of digital technologies, viewers may be able to instantly control the size, color, and location of captions on the screen, providing even more control over which portion of the screen is obstructed by captions. And finally, it is important to remember that the textual information typically provided on home shopping networks is static. Such information can easily be obtained by a deaf or hard of hearing viewer within a few seconds, even if there is partial obstruction of such material by captions at some points in the program.

V. The Commission Should Not Exempt Older Library Programming

Encore Media Group seeks an exemption for programming first exhibited prior to 1970. We oppose this exemption for three reasons. First, there is nothing whatsoever in the statute or legislative history that permits such an exemption. Second, as Encore itself notes, the exclusion of such programming results in a "severe cultural loss" for television viewers. Encore at 6. Older films, which Encore acknowledges is only available to viewers through a few cable stations, offer

an historical representation of eras about which deaf and hard of hearing individuals were largely excluded. Precisely because there was little captioning during the early years of television, and because there is little closed captioning of these movies as they come out in home videos, deaf and hard of hearing individuals have had virtually no opportunity to witness culture and society as it existed during these early years. The FCC should not eliminate this very last opportunity to learn about these times through captioned video programming.⁷ Finally, Encore itself notes that an exemption for such programming would not substantially reduce the requirement for captioning. *Id.* at 8. It follows then, that a mandate for captioning this programming will not be overly burdensome for video providers. Given the above reasons, we urge the FCC to deny Encore's request for an exemption of all programming first exhibited before 1970.

VI. The Commission Should Reject Revisions to the Final Rule Proposed by ALTV

ALTV proposes that the Commission make a number of revisions to its rules, all of which the NAD *et. al.* oppose. Several of these are discussed below:

A. Current Captioning Levels - ALTV urges the Commission to revise its rule requiring stations to maintain their current levels of captioning because, it says, the FCC's requirement to provide captioned programs may interfere with a station's ability to provide programming that is "most responsive to local community demand." ALTV Request at 2. In fact, however, the FCC's mandate provides considerable flexibility for stations to introduce new shows in their programming line-ups; nothing in the FCC's rules specifies the types of programs which local

⁷ During these times, deaf and hard of hearing people were excluded from access to television, movies, theater, and other components of our society. Encore's efforts to continue this type of exclusion should not be sanctioned by the FCC.

stations must caption.⁸ In any event, as we have said in our earlier FCC submissions, Congress intended for the Telecommunications Act of 1996 (1996 Act) to increase, rather than decrease, television captioning. The FCC's rule requiring video programming distributors to continue to provide captioned video programming at substantially the same level as the average level of captioning provided during the first 6 months of 1997, 47 C.F.R. §79.1(b)(3), accomplishes this legislative objective.

B. Programming with repeat value - The FCC's final rules will deny deaf and hard of hearing consumers access to many local events that do not have repeat value. 47 C.F.R. §79.1(d)(8). Many such programs are on subject matters pertaining to local community affairs that are of considerable interest and importance to local viewers. ALTV has now requested that the Commission go even further to expand this exemption to programming that has repeat value as well. We vehemently oppose an expansion of this nature, as it will even further deny access to basic information needed for deaf and hard of hearing persons to actively participate in the affairs of their local communities.

C. Political Candidate Debates - ALTV requests the Commission to exempt candidates' debates from the captioning requirements. Amazingly, it does so in the same breath that it acknowledges that the FCC has engaged in "decades of encouraging stations to broadcast debates." ALTV Request at 8. The fact that the FCC has worked so strenuously to provide the public with access to political debates speaks for itself. The information imparted during these debates is vital to making informed electoral choices, and should not selectively be denied to

⁸ Moreover, ALTV's arguments are illogical. It is hard to understand why stations would not *want* to fulfill their captioning requirements by captioning shows that are most responsive to local community demand.

viewers who need captions. Moreover, the FCC's mandates should make clear that public funds should not be used to finance political debates unless they are captioned.

D. Definition of New Programming - We urge the Commission to define "publish," as it is used in 47 C.F.R. §79.1(a)(5), to be synonymous with "exhibit." Indeed, this would be consistent with the definition provided in Webster's Dictionary: "to place before the public." Webster's Collegiate Dictionary, 5th Ed. at 933 (1977). As such, the FCC should reject ALTV's proposal to define "publication" to include the distribution or offering of a program for distribution, and further reject its proposal to classify programs or series offered in syndication prior to January 1, 1998, as pre-rule programming under 47 C.F.R. §79.1(a)(6).⁹ Finally, to suggest, as ALTV has done (ALTV at 11), that the exhibition or publication of programming should be tied to any distribution method, including theatrical or home video release of a motion picture, is contrary to the plain meaning of the Act. Rather, a common sense reading of the 1996 Act requires that only programming exhibited through television transmissions prior to January 1, 1998 be classified as pre-rule programming.

E. Edited Programming - ALTV seeks an exemption for programming, for example, feature films, which are "edited for reasons of local tastes and suitability." ALTV Request at 12. Put simply, an exemption of this type would defeat the overall purpose of Section 713. Under such an exemption, stations could be relieved of their captioning obligations simply because they asserted a distaste for something contained in the content of a program. Such actions could easily

⁹ It should be noted that, even were the FCC to accept ALTV's, definition of "publication," Section 713 plainly states that all programming published OR exhibited after the effective date of the FCC's regulations must be fully accessible. Accordingly, even programs distributed before that date, but exhibited after that date, fall into the new programming category.

become a veil for video providers intending to evade the captioning mandates, and should not be permitted by the FCC.

F. Barter Transactions and Network Compensation - ALTV urges the Commission not to include the value of barter transactions and network compensation in determining a provider's net value. ALTV Request at 13. Were the value of these items excluded, however, stations would have every incentive to increase the number and scope of such arrangements, which would in turn, reduce overall revenues and captioning obligations. The value of these arrangements are real and tangible, and should not be excluded from the revenue base used to calculate a provider's captioning requirements.

VII. The Commission Should Reject Changes Proposed by the Game Show Network

The Game Show Network makes three additional requests of the Commission, all of which the NAD and CAN oppose.

A. Two Per-Cent Annual Phase-In for Pre-Rule Programming - GSN requests the Commission to require a phase-in of the captioning requirements for pre-rule programming at a rate of two percent a year. We oppose this proposal as absurd, and note that nearly half one's lifetime would have to pass before being able to enjoy captioning on 75% of pre-rule programs were this proposal adopted.¹⁰

B. Interactive Programming Exemption - GSN also requests a categorical exemption for interactive programming. Specifically, GSN asserts that the Commission "should exempt interactive programming from its closed captioning requirements where such captioning would

¹⁰ The Game Show Network further proposes a requirement for "significantly viewed programs" to be captioned, but fails to define when programs would be deemed "significantly viewed." GSN Comments at 16. Thus, we are unable to comment on this proposal.

substantially interfere with the viewability of such programming.” GSN at 19. GSN complains that it is illogical to require programmers to pay for closed captioning just so that viewers may turn off captions to view the program graphics. As noted earlier, however, both graphics and captions can be rearranged to the satisfaction of producers and viewers; this should not be a permissible justification for eliminating captions from an entire category of programming. In any event, even were a viewer required to occasionally turn off captions to see a program’s graphics, this does not negate the ultimate need for that program to be captioned. The audio portion of interactive game shows typically instruct viewers about the rules of the game and often provide the game’s questions and answers. Put simply, deaf and hard of hearing viewers need captions throughout a game show to enjoy such programming with their hearing peers, families, and colleagues.¹¹

C. Greater Revenue Ceiling/Lower Spending Cap - Finally, GSN proposes that the revenue ceiling for networks required to comply with the captioning mandates be raised to \$20 million, and that the spending cap be significantly lowered. The NAD and CAN believe that the FCC reached an appropriate balance when it developed its \$3 million revenue ceiling and two percent spending cap, and we urge the Commission not to revisit this issue at this time.

VIII. Conclusion


In addressing the various requests for reconsideration, we urge the FCC not to lose sight of the ultimate objective of Congress to make television programming accessible for all Americans, including Americans who are deaf and hard of hearing. Indeed, it was with this goal

¹¹ The fact that caption viewers may not be able to participate in such games (because of a few second delay in real-time captioning) is irrelevant. GSN at 18. It is not uncommon for viewers to enjoy such programs even if they do not actively participate in these games.

in mind that Congress directed the FCC to carve out only very narrow exemptions, primarily based on financial strength, from the captioning mandates. The FCC should heed this very specific directive, reject the networks' requests for a weakening of the captioning rules, and revise those rules in a manner that adheres to Congressional intent, as requested by the NAD and SHHH.

Respectfully submitted,

National Association of the Deaf
Consumer Action Network

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November 26, 1997

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response were mailed, postage prepaid, this

26th day of November, 1997, to:

James J. Popham
Vice President, General Counsel
Association of Local Television Stations, Inc.
1320 19th Street, N.W.
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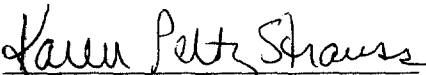
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Annual Survey of Deaf and Hard-of-Hearing Children and Youth, 1995-1996

Gallaudet Research Institute

Frequency distribution for the variable: Facility Type (based on student data forms)

Program Type - for individual student

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Residential school	9112	18.9	19.2	19.2
	Day school	3906	8.1	8.2	27.4
	Reg. ed facility	31548	65.4	66.5	93.9
	Other	2133	4.4	4.5	98.4
	Speech & hng clinic	142	.3	.3	98.7
	Home-bound services	630	1.3	1.3	100.0
	Total	47471	98.3	100.0	
Missing	Blank	803	1.7		
	Total	803	1.7		
Total		48274	100.0		